In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 521

GUIDO FIDANZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on all counts of a four-count indictment brought against him in the United States District Court for the Northern District of Illinois, Eastern Division (Tr. 888). The first count charged petitioner with attempting to evade his federal income tax for 1961 by reporting $375.63 of taxable income and a tax liability of $126.43, when in fact his taxable income was $5,375.63 and his tax liability was $1,153.94, in violation of Section 7201 of the Internal Revenue Code (Tr. 852–853). Counts II, III and IV alleged that petitioner had willfully failed to file income tax returns for the years 1963 through 1965, in violation of Section 7203 of the Code, when

364-230—69

his gross income was $9,649.20 in 1963, $11,240.10 in 1964 and $14,740.00 in 1965 (Tr. 858–860). The court imposed a sentence of five years in prison on Count I, and one year each on Counts II, III and IV, the one-year terms to run concurrently with the five-year term (Tr. 899). Petitioner has been in prison since April, 1968, shortly after his conviction.[1]

The sole contention in the petition for a writ of certiorari is that the prosecutor committed reversible error in his summation by attacking the character of the petitioner, *i.e.*, by branding him an extortionist, swindler and confidence man. It is only necessary to read petitioner's Statement of the Case (Pet. 3–21) to know that the transactions of petitioner proved by the government resulted in income to him from extortion, swindling and the confidence game. The defense, in its 1½-page summation to the jury (Tr. 837–838), argued only that the amounts claimed by the government to represent income to petitioner were not in fact income. It was necessary for the government to prove that petitioner had received income, as distinguished from loan repayments, loans, advances, gifts or other non-business receipts. If, as the government

[1] During the prosecutor's statement in aggravation prior to the sentencing of petitioner, the prosecutor requested that the court conduct a hearing to determine whether or not petitioner should be denied appeal bond. The prosecutor informed the court that some witnesses were afraid to testify against petitioner but that he did have a list of ten people who would testify that petitioner had threatened to shoot them or cut off certain parts of their bodies if they testified against him (Tr. 894–895). The hearing was held on April 18, 1968, and petitioner was denied appeal bond.

contended, the funds received by petitioner arose from extortion, swindling and the confidence game, it necessarily followed that they constituted income. *Rutkin* v. *United States,* 343 U.S. 130; *Rollinger* v. *United States,* 208 F. 2d 109 (C.A. 8). In discharging its burden of showing that petitioner's activities were income-producing in nature, the government was plainly entitled to characterize them for what they were. The summation was limited to proper inferences reasonably flowing from the evidence.[2]

Of course the government may not make an issue of a defendant's character where it is not placed in issue, *Greer* v. *United States,* 245 U.S. 559, cf. *Viereck* v. *United States,* 318 U.S. 236, 247–248, but this is true only where the evidence and argument relating to character are irrelevant to any issues properly in the case. See *Beard* v. *United States,* 222 F. 2d 84, 95 (C.A. 4), certiorari denied, 350 U.S. 846. In the case at bar the characterization of petitioner as an extortionist, swindler and confidence man was not for the purpose of persuading the jury to convict him

[2] The defense never denied that petitioner's income arose from swindling and the confidence game. Indeed, at the close of the government's case, defense counsel [Mr. Caliban] stated. "But I state to your Honor that this is not embezzlement, and it is not extortion, that, if anything, it is fraud, fraud by deception, theft by deception, or con game, or let's say——

"The COURT. Obtaining money by false pretenses?

"Mr. CALIHAN. That's right. * * *." (Tr. 800).

This conversation was not before the jury. Before that body, defense counsel limited himself to a summation of one and one-half pages (Tr. 837–838), evidently recognizing the impossibility of describing petitioner's transactions without incidentally damaging his character.

of offenses other than those charged in the indictment, but because the nature of those activities was relevant to the issue of whether the funds received by petitioner constituted income to him.[3] In the words of the court of appeals, "In order to prove the charges, it was appropriate to prove not only the receipt of funds, but also the character of the transaction to the extent necessary to establish that the money received was income. * * *" (Pet. App. 2).

It should be noted that the court below also found this case to be a very strong one, stating (Pet. App. 3):

> Our reading of the record has convinced us that the jury could not have conscientiously decided to acquit, and that there is no reasonable possibility that the verdict resulted from an appeal for sympathy for the victims or disapproval of [petitioner's] way of life.

In effect, the court of appeals found that even if there was a degree of impropriety in the prosecutor's description of petitioner's activities, it was harmless error.

[3] It might appear from a reading of the petition (Pet. 22–24) that a large part of the prosecutor's summation was devoted to describing the nature of petitioner's illegal activities. But these few references were carefully gleaned from the prosecutor's lengthy summation (Tr. 804–836) and when it is read in its entirety a different picture emerges and the few references complained of are seen in their proper context.

No further review is required. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
JOHNNIE M. WALTERS,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

SEPTEMBER, 1969.